

W.D. NOLEN,
Petitioner-Appellant,
vs.
LAWRENCE E. WILSON,
Respondent-Appellee.

NOV 4 1968



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W.D. NOLEN,)	
)	
Petitioner-Appellant,)	
)	
vs.)	NO. 20984
)	
LAWRENCE E. WILSON,)	
)	
Respondent-Appellee.)	
)	
)	

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, Southern Division, denying his application for a writ of habeas corpus.

A. Proceedings in the State Courts

On February 14, 1963, appellant upon his plea of not guilty, in the Superior Court of Alameda County, while represented by Roy Hamrick, Esq., was convicted of the felony offense of first degree robbery, a violation of California Penal Code section 211 (CT 2, 8). On March 21, 1963, appellant's motion for probation and his motion for a new trial were denied. And on the same day, appellant was sentenced to the state prison for the term prescribed by law.

Appellant appealed the above conviction and said conviction was affirmed by the District Court of Appeal of the State of California, First Appellate District, Crim. No. 4385. Appellant then petitioned for hearing in California Supreme Court and said petition was denied (CT 3). Substantially the same legal issues now presented to this Court were raised in those proceedings.

B. Proceedings in the Federal Courts

On March 15, 1966, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1). The Honorable Albert C. Wollenberg denied the application on March 24, 1966 (CT 11). The basis of the Court's order was that upon examining the trial transcript, the Court could not conclude the petitioner was denied a fair trial, even assuming

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JOHN H. ...

IN THE DEPARTMENT OF ...

CHICAGO, ILLINOIS

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that certain errors were committed by counsel (CT 12). Moreover, the issue of sufficiency of the evidence did not present a federal question (CT 12).

On April 19, 1966, Judge Wollenberg granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis (CT 13).

A notice of appeal was filed by appellant on April 4, 1966 (CT 14).

APPELLANT'S CONTENTIONS

On this appeal appellant contends (1) that he was denied due process because of deliberate misconduct by the district attorney, (2) motion to exclude certain evidence constituted prejudicial error, (3) the failure of the court to grant a motion for a mistrial or to admonish the jury as the handling of a certain exhibit constituted prejudicial error, (4) comments of the trial court regarding the effect of an admission by a codefendant constituted prejudicial error, (5) questions directed to the appellant on cross-examination regarding his possession of a gun found in the glove compartment of the car constituted prejudicial error, (6) the testimony of an accomplice was not sufficiently corroborated, and (7) the evidence was insufficient to support the verdict.

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant has not shown he was deprived of his constitutional right to a fair trial.

II. The allegations that the evidence was insufficient do not raise a federal question.

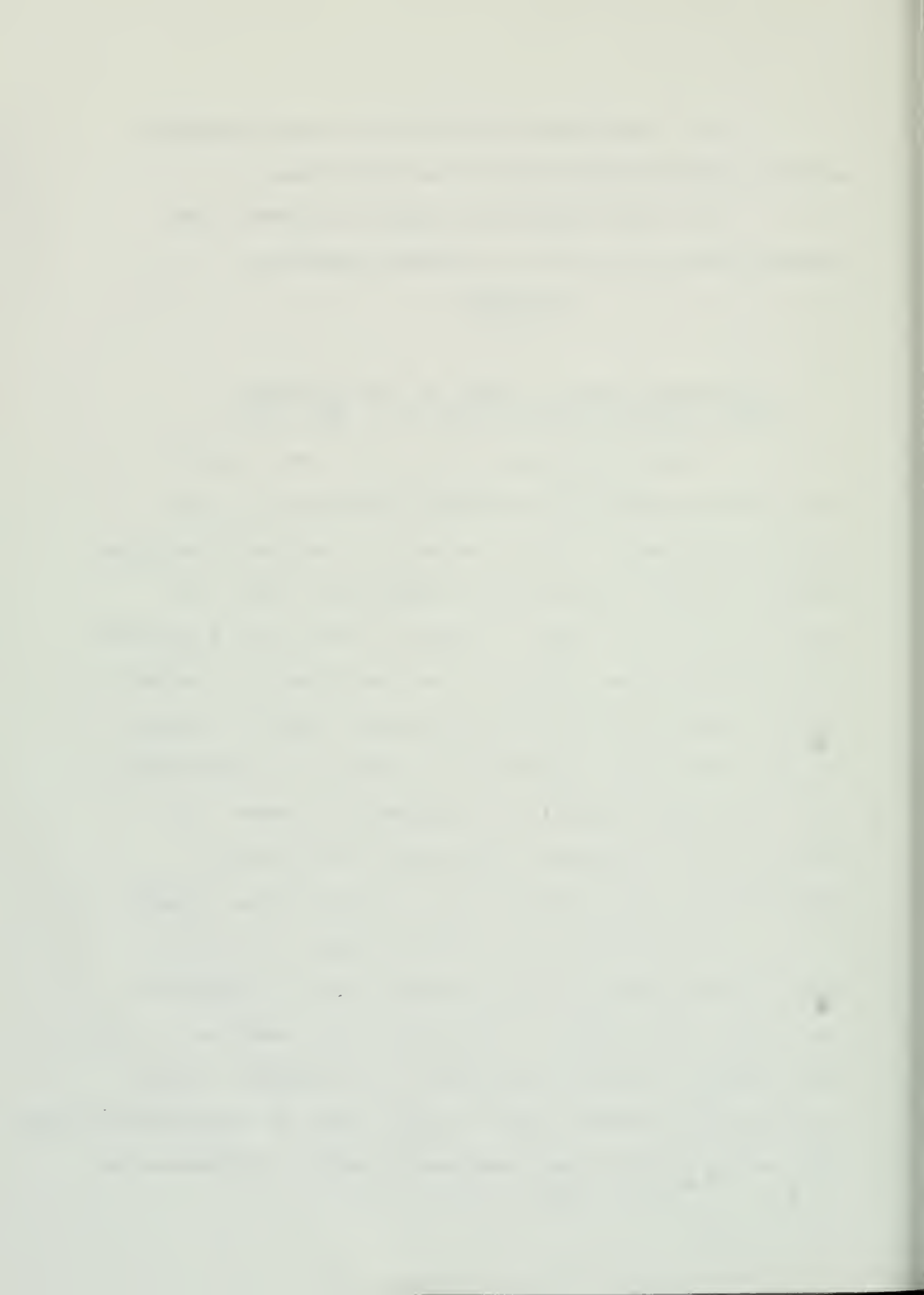
ARGUMENT

I

APPELLANT HAS NOT SHOWN HE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellant asserts that (1) he was denied due process because of deliberate misconduct by the district attorney, (2) the denial of a motion to exclude certain evidence constituted prejudicial error, (3) the failure of the court to grant a motion for a mistrial or to admonish the jury as to the handling of a certain exhibit constituted prejudicial error, and (4) comments of the trial court regarding the effect of an admission by a codefendant constituted prejudicial error. In making these allegations, appellant has failed to demonstrate he was deprived of a constitutional right.

The function of a federal court "in this type of proceeding is not to correct errors committed in a state trial court. [citation] 'The state has full control over the procedures in its courts, both in civil and criminal cases; subject only to the qualifications that such procedure must not work a denial of fundamental



rights, or conflict with specific and applicable provisions of the Federal Constitution.'" Sampsell v. People of State of California, 191 F.2d 721, 725 (9th Cir. 1951). Here, appellant has failed to demonstrate that he was in any way denied his constitutional right to a fair trial.

Appellant first contends that he was prejudiced by questions asked by the prosecutor in cross-examination concerning a gun found in the automobile appellant had in his possession at the time of his arrest. In essence, appellant argues that the gun referred to was not the gun admitted into evidence as the one used by appellant in the perpetration of the robbery, and that the complained of questions could only have served to show appellant is the type of person who had deadly weapons in his possession, to his prejudice.

The prosecutor began his cross-examination of appellant by questioning him concerning the automobile found in his possession at the time of his arrest, and a purse which was found therein (RT 187-188).^{1/} He then asked: "Now can you tell me how the gun got into the purse?" (RT 188: 19). Appellant objected

^{1/} "RT" designates the Reporter's Transcript on the State appeal.

to the question; it was not answered, and the court granted appellant's motion to strike the "testimony" with reference to the gun (RT 188-89). Thereafter, appellant testified that he placed the gun in the purse, and when asked what he had put in the purse, he answered, "A gun" (RT 189: 15-26). During this entire testimony, no objection was made by appellant.

Under California law, appellant must show that when the complained of questions were asked at the trial, he objected and specifically stated the proper grounds for objection to the particular evidence he sought to exclude. Failure to show this amounts to waiver. See, e.g., People v. Ferlin, 203 Cal. 587, 600 (1928); People v. Dement, 48 Cal.2d 600, 604 (1957).

Appellant's failure to object at all during this now complained of line of questioning clearly amounted to an affirmative waiver.

Appellant next contends that the failure of the court to grant appellant's motion to remove from evidence a gun which a codefendant testified that appellant used in the robbery on the grounds that it was not sufficiently identified as the gun used, was a denial of due process.

During the trial, the prosecution produced

a gun which was positively identified by Robert Dorsey (a codefendant) as the gun used by appellant during the robbery. Dorsey stated that he had placed the gun in the front seat of a 1950 Ford automobile, and that appellant had obtained it therefrom prior to entering the West Coast Food Market (RT 101: 22-26; 102: 1-6). The gun was received in evidence without any objection being made by appellant. On cross-examination, Dorsey testified that he had brought two guns with him to the automobile on the evening of October 27, 1962; that one was a .32 automatic, which he kept, and the other, a ".45" which he described as a "Hawkins" revolver. He claimed that appellant had the latter gun in his possession when they left the automobile to enter and rob the West Coast Food Market (RT 1113, 116, 117). The gun admitted in evidence was subsequently identified as a .357 caliber "Blackhawk" made by Sturm, Ruger Company (RT 147).

Thereafter, after resting his case, appellant moved to strike the gun from evidence on the grounds that it had not been identified. The trial court denied this motion (RT 198-99). Appellant now argues that the trial court's action constituted a denial of due process.

Five eyewitnesses to the robbery testified

that the robber who took the money and hit the clerk over the head, carried a gun (RT 8, 37, 46, 67, 101). Appellant was positively identified as that robber (RT 12-13, 26, 41-42, 57, 90, 91-92, 94, 101).

When shown People's Exhibit #1, Dorsey identified it as the gun which appellant used in the perpetration of the robbery. The fact that Dorsey's description of the gun as a ".45" and "Hawkins" revolver was contradicted by a policeman's testimony that after examining the gun he found it to be a .357 Sturm, Ruger "Blackhawk," does not destroy Dorsey's visual identification of the gun in evidence as the one used by appellant. The gun was positively identified, and it alone was the best evidence of what type, caliber, and make it was. The action of the trial court, here, clearly did not constitute a denial of due process of law.

Thirdly, appellant Nolen contends that the denial of appellant's motion for a mistrial and the court's refusal to admonish the jury following the unloading of a gun in the presence of the jury constituted a denial of due process.

Although the exact circumstances are not contained in the record, it appears from a colloquy between the prosecutor, trial court and defense counsel, held in chambers after appellant's counsel had rested

his case, that during the first day of trial the gun which was later admitted into evidence as People's Exhibit #1, was brought to the courtroom where it was found to contain cartridges and was unloaded by the bailiff at his desk. At the time of the incident, appellant made no objection. Instead, appellant waited until he had concluded his case for the defense, and then moved for a mistrial on the grounds that the incident constituted prejudicial misconduct on the part of the district attorney (RT 199). The court denied the motion but stated that it would admonish the jury relative to the incident (RT 199, 200).

During the discussion in chambers, the prosecutor explained that the gun had been loaded when obtained by the police department; that the cartridges removed were apparently empty or dummy shells; and that the incident was due to inadvertence (RT 199-200). The court then advised appellant that it would admonish the jury relative to the incident only if appellant was willing to have testimony adduced as to the condition of the gun when it was obtained by the police (RT 202-203). Appellant was unwilling to allow such testimony, and his motion for an admonition to the jury was thus denied (RT 204). Appellant now argues, on the basis of the above recited proceedings, that the action

of the court constituted the denial of due process.

Appellant further singles out certain comments made by the court during a discussion with the prosecutor and appellant's counsel.

Earlier in the trial, a statement taken from appellant's codefendant, Louis Bershell, was admitted into evidence (RT 143-45). At that time, the trial court properly admonished the jury that the statement was "binding only upon the defendant Bershell and not on the defendant Nolen." (RT 141: 10-11).

The trial court gave this admonition after the following colloquy:

"MR. HAMRICK [Appellant's counsel]: Now, your Honor, may we have an instruction at this time by the Court to the jury that this statement or admission or concession, or whatever it is, relates only to the defendant Bershell; that it is not and cannot be considered in any extent as far as the defendant Nolen is concerned?

"MR. MEAD [Prosecutor]: People so agree, Your Honor.

"MR. HAMRICK: It is hearsay as far as he is concerned and as such, is not to be treated as any evidence against him or for him, shall we say."

(RT 140, 141).

Appellant does not attack the admission of Bershell's statement. Nor does he claim the admonition then given to the jury that they consider that statement only against Bershell was ineffective. What appellant does contend, however, is that certain later comments made by the trial court gave credence to segments of the statement implicating Nolen, and recalled to the minds of the jurors the statement of Bershell implicating Nolen, thus acting to supersede by approval the admonition given earlier with respect to the statement. The record, however, demonstrates appellant's arguments to be but hopeful speculation.

The events of which appellant complains arose during the prosecutor's impeachment of Bershell's testimony. The prosecutor proceeded to do this by questioning appellant as to whether he had given the answers to Inspector Smith which were contained in the statement in evidence. Bershell maintained that appellant was not involved in the robbery (RT 225), and thus denied making any statement to Inspector Smith implicating appellant (RT 232).

After the prosecutor had pursued this line of questioning for some time, appellant requested an admonition, whereupon the following transpired:

"MR. HAMRICK: Going to ask that the Court the jury that - I assume that this is for impeachment purposes only of Mr. Bershell, is that correct, Counsel?

"MR. MEAD: Yes.

"MR. HAMRICK: I would again ask that admonition be made that this is for that purpose only, and if not - does not affect the defendant Nolen at this time, if the Court please.

"THE COURT: I don't know that I can so limit it. There's certain admissions made that the jury will draw any inferences and conclusions that they feel warranted.

"MR. HAMRICK: Well, I would assume that this is for purposes of impeachment, is that correct?

"MR. MEAD: Yes, at this time the statement is being used for purposes of impeachment of the witness, Your Honor. This is not to say that the statement insofar as it came from the mouth of the detective is not to be taken as substantive evidence insofar as Mr. Bershell is concerned.

"THE COURT: That's right, or Nolen.

"MR. MEAD: Well, the statement is not directed against Mr. Nolen, Your Honor, being a statement of the witness Bershell.

"THE COURT: All right.

"MR. HAMRICK: May I have my request for the admonition, Your Honor, that any statement or purported statement that refers to Mr. Nolen by Mr. Bershell is no evidence at this time against Mr. Nolen?

"THE COURT: This, ladies and gentlemen of the jury, is purely for impeachment purposes of Mr. Bershell." (RT 233, 234).

Appellant, apparently, contends that comments of the court during the colloquy between it, the prosecutor, and counsel for appellant were so prejudicial as not to be susceptible of correction by the admonition given.

It is the California rule that even though a comment standing alone might be legally objectionable, such comment must be considered in the context of circumstances. See People v. Juehling, 10 Cal.App.2d 527, 533 (1935). Observance of this rule destroys appellant's contention.

It should be noted, that throughout the exchange, the jury was aware that counsel for appellant and the prosecutor were in agreement that the questioning of Bershell by the prosecutor was to be considered for impeachment purposes only, and any use of the statement which the jury had been already admonished to consider only as against Bershell, would be again

considered only against Bershell.

The first statement made by the court, indicated an unsureness as to the effect to be given the prosecutor's question, but no specific reference was made to the statement which had been read into evidence earlier and limited to Bershell. Although the court's next fragmentary comments might be construed to indicate that the statement was admissible also against appellant, the court had previously admonished the jury to the contrary, and immediately recognized this in response to the prosecutor's declaration that the statement was so limited.

The admonition given, coming as it did after extensive comments by both counsel as to the limited effect of the use of the statement, clearly precluded any prejudice to appellant by reason of the jury's consideration of Bershell's statement against him. The jury was properly admonished, and it must be presumed that they deliberated accordingly.

Under California law the comments of the trial court may constitute reversible error only when it is apparent that those remarks deprive the appellant of a fair and impartial trial. See People v. Kendrick, 56 Cal.2d 71, 92 (1961); People v. Browning, 132 Cal.App. 136, 153 (1933). Here, none of the remarks were so

prejudicial.

It is, therefore, apparent that the above allegations of appellant involve questions of state procedure and do not present federal questions. The decision of the California District Court of Appeal clearly demonstrates that appellant was neither denied the right to a fair trial nor did the procedures followed during the trial indicate any constitutional infirmities. Moreover, even if such allegations do present a federal question, petitioner has wholly failed to demonstrate how he was thereby deprived of a constitutional right. Sampsell v. People of State of California, 191 F.2d 721 (9th Cir. 1951).

II

THE ALLEGATIONS THAT THE EVIDENCE WAS
INSUFFICIENT DO NOT RAISE A FEDERAL QUESTION.

Appellant here argues that the evidence was insufficient to support the verdict. Insufficiency of the evidence to support a conviction in the state court is not a basis for a habeas corpus in federal court. In re Dotson v. United States, 314 F.2d 50 (10th Cir. 1963); Miller v. Oberhauser, 293 F.2d 29 (9th Cir. 1961); Wampler v. Warden, Maryland Penitentiary, 224 F.Supp. 37 (1963).

Moreover, appellant is not entitled to federal

habeas corpus relief on the allegation that there was lack of corroboration of the testimony of an accomplice. Wampler v. Warden, Maryland Penitentiary, supra.

Here the record clearly indicates substantial, if not overwhelming, evidentiary basis for conviction. Thus, there is a difference between a conviction based on evidence deemed insufficient as a matter of state criminal law and one totally devoid of evidentiary support as to raise a due process issue, and it is only the latter situation that affords appellant a remedy in a federal court on a writ of habeas corpus. Faust v. State of North Carolina, 307 F.2d 869 (4th Cir. 1962); cert. denied 371 U.S. 964.

Thus, appellant's final two allegations regarding the insufficiency of the evidence fail to raise a federal question and therefore do not afford grounds for relief on habeas corpus in this court.

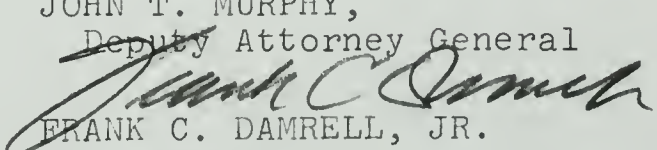
CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: August 15, 1966.

THOMAS C. LYNCH, Attorney General
of California

JOHN T. MURPHY,
Deputy Attorney General


FRANK C. DAMRELL, JR.
Deputy Attorney General

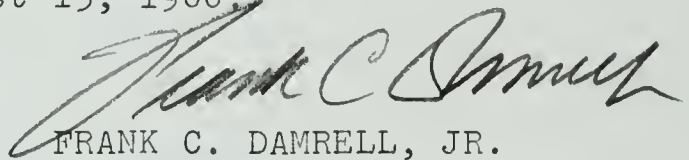
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

August 15, 1966.

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.
Deputy Attorney General
of the State of California